IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 734 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KESHABHAI MAGANBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 734 of 1998

MR KB ANANDJIWALA, learned advocate for Appellant No. 1

MR KT DAVE, learned APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 19/09/2003

CAV JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.K.TRIVEDI)

#. The present appeal is filed by the appellant accused challenging the order of conviction and sentence recorded by the learned Additional Sessions Judge, Sabarkantha, Camp at Modasa passed in Sessions Case No. 59 of 1994 dated 20th July, 1998, wherein, the learned Trial Judge has after considering the evidence led before him and considering the defence of the accused, has accepted the prosecution case and convicted the appellant accused for the offence under Section 302 of the Indian Penal Code and ordered to suffer R.I. for life and fine of Rs.1000=00 and in default, R.I. for 6 months.

#. We have heard Mr. Anandjiwala, learned advocate, who appeared for the appellant accused and Mr. K.T. Dave, learned APP for the respondent State. During hearing, the counsel appearing in the matter has taken us through the paper book consisting of oral and documentary evidence as well as the judgement under challenge.

During hearing, considering the contentions raised by Mr. Anandjiwala in light of the ballistic report and as the weapon used in the commission of offence is service rifle, we have by separate order, directed the trial Court to transmit the muddamal articles including service rifle, which were received by this Court by Special messenger and we have examined the said rifle by taking assistance of a police guard attached to the court about the working of the said rifle.

It is the prosecution case that the offence in question has occurred on 9th April, 1994 and as per the prosecution case, the appellant accused was working as armed Police Constable, having his bakkal No. 1216 at Meghraj Police Station. At the relevant time, the accused was on duty as a Guard at Treasury office situated at opposite to Meghraj Police Station and on that day, i.e. on 9th April, 1994 between 14-00 hrs. to 16-00 hrs. and between 20-00 hrs. to 22-00 hrs., he was assigned duty as a Guard at Treasury. During duty hours between 21-15 hrs. leaving the duty as Guard at Treasury, illegally he proceeded towards the Police Station by murmuring that why he continued on duty as a Guard. At that time, near Police Station, writer Head Constable Dipsinh Laxmansinh was standing. The said Writer Head Constable Dipsinh had asked the accused that why he has left the duty as a Guard and asked him to go back and attend the duty and keeping this in mind, with

an intention to commit murder of the said Dipsinh with 303 rifle provided to him brought from the guard room at Treasury and from the duty place at the Treasury guard, after aiming at Dipsinh, who was standing near godown situated opposite to Treasury room and after firing from the weapon, committed murder of Dipsinh Laxmansinh Rathod with the bullet and thereby, the accused has committed offence under Section 302 of the I.P.C.

#. It is the prosecution case that at the relevant time, there were many police persons were present namely Ravjibhai, Ditajibhai, Chimanbhai and Rameshbhai Jethabhai. Due to injuries sustained by Dipsinh Laxmansinh from the bullet, he was immediately removed to Government hospital, where, he was declared dead. Ravjibhai was also on duty, who gave complaint immediately on the very day i.e. on 9.4.1994 at 10-15 hours and offence was registered at Meghraj Police Station. After registering the offence, the investigation was in process and as Dipsinh, Writer Head Constable was declared dead, the inquest panchnama of deadbody of Dipsinh was done in presence of panchas. The cloths from the dead body was also seized. The panchnama of the scene of offence was also done in presence of panchas. From the possession of the accused, empty box of cartridge was seized in presence of panchas and rifle which was used by the accused in the commission of offence was also seized and the personal search of the accused was also effected in presence of panchas. The Investigating Officer has also recorded the statement of witnesses. The muddamal seized were also sent to FSL for examination. The weapon used in the commission of offence by the accused was sent for opinion of the Ballistic export and after getting opinion and ballistic report, prima-facie case was found against the accused and accordingly, the chargesheet was filed before the Court of learned Judicial Magistrate First Class at Modasa and as the case is exclusively triable by the learned Sessions Judge, learned Judicial Magistrate First Class has committed the case to the court of Sessions for trial.

#. During trial, the prosecution has examined 14 witnesses including the medical officer, who has performed the Postmortem on the dead body of the deceased Dipsinh and the evidence of Ballistic Export. The defence of the accused is of total denial. It is an admitted fact that deceased Dipsinh Laxmansinh was at the relevant point of time working as a Head Constable in Meghraj Police Station. As found from the panchnama of the scene of offence as well as from the map on the

record, it transpires that in the compound of the Police Station, there are other offices namely office of the Mamlatdar and Treasury Office and at some distance, there is a Government Guest House and the same is also near to the office of the Mamlatdar. The strong room is also there, in which, armoury is being kept. Opposite to the Police Station in one corridor, the office of the Mamlatdar and Treasury office are situated and both have common lobby. As found from the map, the distance of scene of offence from the guest house is at about 35 ft. and there is one lamp post, which is at a distance of about 79 ft. from the place of offence. As regard to the motive to the offence, as suggested by the prosecution is that the appellant accused has grievance that he was asked to performed duty continuously and when he went to ventilate his grievance before Head Constable Dipsinh, Dipsinh has informed him to perform duty and accused himself has again went at the place, where, he was on duty as a Guard. As suggested by the prosecution that for doing duty as a Guard continuously, the accused had some altercation with deceased Dipsinhbhai and in hit of moment and to take revenge, the accused has with his service weapon, fired on Head Constable Dipsinh and committed murder of Dipsinh. As found from the evidence that appellant accused was posted as a Guard at Treasury office since 8th April, 1994 and he was on duty as a Guard upto 10.4.1994. Head Constable Dipsinh was Writer Head Constable, who was the person to assign duty to his subordinate constables on 9.4.1994. The accused was posted to discharge his duty as a Guard at Treasury between 8-00 to 10-00 p.m. and appellant accused has took charge from another Guard Ravjibhai Khimjibhai, who was also attached to Meghraj Police Station. The appellant accused has because of continuous duty as a Guard, made his grievance before Dipsinh, as to why his posting was not changed and he was kept continuously on duty on that post as Treasury Guard. It is further found from the evidence that deceased Dipsinh had informed the appellant that as there were no other police constable available, the accused has to work continuously on duty as a Guard till next day and it is also the case of the prosecution case that after he got satisfied reply from Dipsinh, the accused had return back to performed his duty as a Guard at Treasury office. Mr. Anandjiwala, learned advocate has vehemently urged that the learned Trial Judge has committed error in accepting the prosecution case, though the learned Trial Judge has in term held that there is no direct evidence to suggest that any of the witness has seen incident of firing by accused on the deceased Dipsinh. However, learned Trial Judge has convicted the accused by accepting some of the

circumstances and by relying upon such circumstances, he has passed the order convicting the accused, which has resulted into miscarriage of justice.

#. He next urged that even as per the evidence of Ballistic Export, it transpires that cartridge, which was found from the barrel was not fired from the seized muddamal rifle possessed by the accused and that important circumstantial evidence clearly destroy the case to be put forwarded by the witnesses before the Court that they have actually seen the accused, firing from his rifle on the deceased Dipsinh and prosecution has failed to prove the case against the accused.

#. Mr. K.T. Dave, learned APP has supported the judgement and order under challenge. According to Mr. Dave that the witnesses examined by the prosecution were on duty and they have seen the incident and therefore, with the help of their evidence, the prosecution has proved that accused had while on duty at Treasury and motive as suggested above, had fired on deceased Dipsinh and thereby, committed offence of murder and the learned Trial Judge has rightly accepted the prosecution case by convicting the accused under Section 302 of the I.P.C.. According to Mr. Dave that the presence of eye witnesses at the scene of offence is natural and can not be doubted as they were also police personnel. According to Mr. Dave from the evidence of the witness, there is no material contradiction, omission or improvement is proved and further the defence has not brought anything from the evidence of eye witnesses that they are falsely involving the accused in the commission of offence. The medical evidences also support the case of the prosecution, which suggest that deceased died due to injuries, which were caused by firing arms. Mr. Dave, has accordingly urged that even the learned Trial Judge has considered the evidence led by the prosecution and all the witnesses have in term supported the prosecution case and further that, the conduct of the accused suggests guilty mind. According to Mr. Dave, the conduct of the accused also suggests that he was the person, who has used his fire arm and after using fire arm, he immediately ran away from the place and further that the prosecution has established that accused was hiding himself, when he was caught by other police persons, immediately after the incident. The accused has not offered any explanation how and when fire arm which was seized from the accused was used and the accused did not came out with any explanation immediately. When he was arrested, it was the defence of the accused that he was chasing someone and such defence was admittedly after thought. According

to Mr. Dave that the evidence led by the prosecution in the form of ballistic report is highly suspicious, as according to Mr. Dave that (i) the report of the Ballistic was dogmatic in nature without any explanatory reasons supporting opinion. (ii) The recovery of empty cartridges itself is highly suspicious since the method of applying seal was defective and effective seal was not applied. (iii) The recovery of empty cartridges is not legally proved by the evidence of panchas and the same was proved only by the evidence of the Investigating Officer. (iv) Possibility of tempering with the Muddamal of empty cartridges cannot be ruled out, since the accused is Police Man. According to Mr. Dave, in light of the evidence led and considering the defence of the accused, the learned Trial Judge has rightly discarded the defence raised by the accused and accepted the prosecution case and prayed that the order of conviction and sentence awarded by the learned Trial Judge be confirmed and appeal filed by the appellant accused be dismissed.

#. In light of the submissions made before us, it is necessary for us to discuss the evidence lead by the prosecution in brief.

#. As found from the evidence of Doctor Rameshchandra K. Sheth, P.W.- 1, he was working as Medical officer at Group Health Centre at Meghraj. On 9.4.1994 at about 11-55 p.m., the dead body of deceased was brought at hospital under police yadi. The said dead body was identified by Devendrasinh and Dashrathsinh, sons of deceased Dipsinh Rathod. He has deposed that P.M. Examination on the dead body of deceased Dipsinh was done on 10.4.1994 at 2-00 a.m. and completed the same on 4-00 a.m. Prior to performing postmortem, he has taken X-ray of the dead body to find out that whether any foreign object was there inside the body. According to him that age of the deceased was about 52 years. The cloths were having blood stain. He found the 3 injuries, which he noted down in column No. 17 of the P.M. note. P.M. Note Ex. 16 is established by Dr. Sheth. The cause of death according to doctor was due to which is reflected in P.M. Note, which read as under :-

"To the best of my knowledge and belief the death
has occurred due to 'injury to vital organs

Ex. 17, is a certificate issued by Dr. Seth, disclosing the cause of death of deceased Dipsinh. As per the opinion of Dr., the injury found on the deceased was antemortem and injury found was possible from firing

of bullet from rifle. The doctor has further deposed that on seeing the X-ray plate, they were found with stain of Gun Powder and according to Dr. Seth that injuries found on Dipsinh were possible from 303 rifle.

#. As found from the cross-examination of Dr. Seth that he has in term admitted that it was his first P.M. Examination, where, the person had died due to gun shot injury and further that in the normal circumstances, they did not carry out P.M. Examination at night. He has further admitted that it is correct that in the P.M. Examination nowhere, it has been stated that white shirt and white baniyan were found torned and he has admitted that it is true that before performing P.M. Examination on the dead body, the cloths found on the dead body and condition of the cloths were required to be written down. He has deposed that in their hospital, no radiologists doctor was there and accordingly, X-ray was taken by the technician in his presence under his supervision. He has admitted that from the dead body of the deceased, no bullets was found. He has further admitted that it is correct that in column No. 17 of the P.M., the injury No. 2, whether the injury is on the left side or right side was not mentioned. The injury No. 1 was found blackening. However, the same was not cheering. He has deposed that injury No. 1 was blackening not due to cheering but it is due to tissues, which were died and further admitted that reason for tissues blackening were not there in any injury. In injury No.1, there was necrosis and because of that, it was found blackening and injury No. 2, there was no necrosis and accordingly, there was no blackening. According to Dr. injuries were sustained on tissues and accordingly, necrosis was found and doctor has accordingly, considered that there is a blackening. He has considered that such blackening is due to gun powder. In cross examination, while giving description to the entry to the wound, the Dr. has deposed that the entry side of the wound to the exit side was below and external, there were 13 injuries and the same has nothing to do with gun shot injury. The Dr. has in term while referring the medical jurisprudence, deposed that the skin was found blackening due to gun powder and according to Dr. the distance from the person, who has fired and the person, who had sustained injury, must be less than 50 mt. and further, while referring to the medical jurisprudence of Dr. Bernard Night, 6th Edition at Pg.340 in para 3, where it was found that the firing has taken place within less than 5 mt. of range, then, there were no sign of blackening or any cheering and the doctor has in term admitted the said view and doctor has in term admitted that in the present

case, firing has taken place above the range of 5 mt. and accordingly, as per the evidence of Dr. Seth, who has performed the PM Examination of deceased Dipsinh that the firing has taken place within a short range of 5 mt. distance.

##. The injuries which is noted down in the inquest panchnama Ex. 48, is drawn by the police in presence of panchas, suggest that injuries were found on the deceased Dipsinh on the chest and as per the medical evidence, the prosecution has established that the death of deceased Dipsinh was unnatural and the learned Trial Judge has accordingly, in term held that the prosecution has established that death of Dipsinh was unnatural.

##. Ravjibhai Kamjibhai Bodad, PW-2 has deposed that on 9.4.1994 he was on duty as Police Guard at Treasury office, situated near Meghraj Police Station. Mamlatdar office is situated very close to Treasury office. The sitting place, where they used to sit, was close the Treasury guard room. To protect the Treasury, three armed police constable and one head constable were posted and these persons were provided 303 rifles and these rifles were provided to them by names. The unarmed constables were provided 410 rifle and these rifles and muskets were kept in the Treasury guard room and all these rifles were kept on wooden stand. To protect Treasury as well as to to protect weapons, one plus three guards were provided and these guards were changing and commander was posting the change duty. The duty hours were noted down in the book known as "Santari book". The guard who has performed duty as a Treasury guard and head constable were being provided 10 live cartridges for their 303 rifles and these cartridges were kept by them in their pouch and these cartridges were kept by the guard in the respective weapons. One, who was performing duty as a Santari, he was being provided with 410 musket and said musket rifle, 10 buckshot cartridges were being provided and the person, who was on duty has to hand over his 410 musket and 10 buckshot cartridges to a person, who has to perform duty as Santari. He has deposed that if any other Superior Officer came there, then all the persons after getting alarm from Santari, get ready and salutes the Superior Officer and after that officer left the office, except Santari on duty, other police staff put their rifles and cartridges at guard room at the appropriate place. Thus, one Santari has to remain on duty.

While referring to the incident, according to witness that on 9.4.1994 his duty hrs. started at 11-00

p.m. at Treasury and his duty was as a post guard commander and he has taken charge from guard commander Mangabhai. Alongwith him, other guard constables namely (i) Ramesh Jethabhai (ii) Dita Kanjibhai and (iii) Kesha Maganbhai were performing their duties since 8.4.1994. As he was guard commander, he has to assign duty to the police constable and he has to write down hours in the Santari book about the performing duties from what time to what time by the police constables. On that day, the duty hours of Ramesh Jetha was from 11-00 to 12-00, 16-00 hrs. to 18-00 hrs., 22-00 hrs. to 24-00 hrs. Rameshbhai's duty hours on 10.4.1994 were from 4-00 to 6-00 hrs. and duty hrs. of Police Constable Ditaji Kanaji from 12-00 to 14-00 hrs., 18-00 to 20-00 hrs. and on 10.4.1994 from 0-00 to 2-00 hrs., 6-00 to 8-00 hrs.. The duty hours of accused Keshabhai Maganbhai as a police constable was assigned on 9.4.1994 between 14-00 to 16-00 hrs., 20-00 to 22-00 hrs. and on 10.4.1994 from 2-00 to 4-00 hrs. and 8-00 to 10-00 hrs.. All the three constables were given duty hours as a Guard for two hours. On 9.4.1994 Police Constable Gitaji Kanaji, his duty hrs. were from 18-00 to 20-00 hrs. as a Guard was over and accused Police Constable Keshabhai has taken charge from him as a guard at 20-00 hrs. and accused Keshabhai when, he was on duty as a Treasury Guard, at that time, he and other Guards were present. At that time, accused at 20.30 hrs. had after completing his duty hours, had gone towards the police station and he was telling that why he continued on double duty and his voice was high. At that time, immediately, the witness has called him back. In the front of the police station, Writer Head Constable Dipsinh and one Chimanbhai, Head Constable of Undva out Police Station were standing. Dipsinh has told accused Keshabhai that at present, there were no police constables available and you continue your duty and after the person was available, he will see to relieve him and accused has again resumed to perform his duty as a guard. While performing duty as a guard, the accused Keshabhai was of and on used to go to the guard room and he was again performed his duties. According to the witness, at the relevant time, he alongwith other persons, were present at Treasury guard and constable Dipsinh, in charge of Meghraj Police Station and Head constable Chimanlal Mohanlal were present near Government godown, which was situated opposite to Treasury office. There were other persons, who were also present. There were also other persons in the police station were present. Dipsinh and Chimanbhai were talking while standing near godown and at about 21.15 hrs. the accused Keshabhai, who was performing his duty as a Guard at Treasury, has fired from his rifle towards Dipsinh and

Chimanbhai and bullet had hit Head Constable Dipsinh and Dipsinh has immediately fallen down and Chimanbhai was standing with him, has came towards the police station by raising shout that Dipsinh has sustained bullet injury and he was to be removed to hospital. At that time, Keshabhai was on duty as a Guard, who with his rifle ran away towards Government Guest House. Witness Ravjibhai and other Guards and Jaydeepsinh and Police Constable Balbhadrasinh from the police station came and all went towards Government Guest House to chaise Keshabhai. Keshabhai was found behind guest house and Keshabhai was apprehended with rifle and brought at the police station. Prabhat Vaghji was at that time performing duty as a PSO and accused was handed over to him. The 303 rifle and Butt No. 369, which was issued in the name of Keshabhai, was with him and 410 basked was not found. The bolt of the rifle was closed and as other fire could not take place, the witness has opened the bolt of the chamber and he found one empty charger, which was called used cartridge box, was also handed over the PSO. The personal search of Keshabhai was done by PSO. He has worn uniform and from the pocket of the shirt, two chargers for getting the cartridges were found, which were kept by the PSO. Chimanbhai - Head Constable, Arjunbhai have taken the injured Dipsinh in the hospital in Government Jeep and the message was received from wireless that Dipsinh has died. According to the witness, while suggesting motive, for keeping the accused in continuous duty, to perform duty as a guard, when he has made his grievance before deceased Dipsinh and to take revenge, the accused has fired a gun shot by aiming Dipsinh. It is further found from the evidence of Ravjibhai that in the guard room, there was one window and there was no way behind and a person, who was performing his duty as a Santari had also to enter the guard room and to see from the window and the witness has accordingly under belief that the accused had entered into the guard room, as a part of his duty and they have not suspected the accused. The witness has further deposed that accused had entered the guard room at that time, he was in possession of 410 musket and those cartridges were kept on the wooden stand and the 303 rifles, butt No. 369, which was issued in his name, after loaded the rifle, inside the room and other cartridges kept in the magjin and after loading rifle, he aimed his rifle on Dipsinh and committed murder of Dipsinh. At the relevant time, as 10th and 12th standard examinations were going on and there was shortage of police personnels and the persons who were on guard duty, were continued to perform their duties. Accused Keshabhai had made his grievance to Dipsinh for change of

his duty but the same was not possible. Witness has further deposed that thereafter, he entered in the guard room. He had gone to the room where, weapons were kept, where, he show 410 musket and their cartridges were found on the stand. He has also shown the empty leather pouch for getting the bayonet and cartridge, which was issued to Keshabhai in the guard room, which was not found in the guard room and he has given detail complaint to PSO. He has put his signature in each of the pages of the FIR. Ex. 19 is the FIR filed by Ravjibhai PW-2. It is further found from his deposition that there was an open ground between Treasury guard room and place of incident, where there was one lamp having mercury bulb. On the western side, there was a godown and on the western side, there was a quarters meant for PSI and adjacent to quarters, there was a police station and there only one lobby, combined to Treasury guard room, Treasury office and office of the Mamlatdar. The distance between Treasury guard, where the accused was performing his duty and the deceased Dipsinh, where he was standing, was approximately 290 feet and distance between the office of the Mamlatdar and Police Station was very less and on the middle of the ground, there were staff quarters. The light was on at the time of incident and the witness has further deposed that in the office of the Mamlatdar, near Police Station and on the open compound, tube lights were on and because of these lights, he was in a position to see Dipsinh, where he was standing. He has also deposed that he was also in a position to see the accused, where he was performing his duty. According this witness, when he was sitting, the accused was performing his duty at a distance of 5 to 6 steps and he has seen the incident by his own eyes. He identified the weapon namely 303 rifle, Muddamal article 4, having butt No. 369, which was issued to accused Keshabhai, which was the same, which was used in the commission of offence. After opening one seal packet, he found that there was one slip having signature of panchas and signature of PSI and one receipt. That chit bearing a stamp of FSL. From the said parcel, one box of used cartridge was found, which was used by accused by firing from his rifle. After seeing the said box, according to the witness, the same was recovered from 303 rifle, having butt No. 369. The witness has accordingly, identified the said empty cartridge box. The witness has also identified the two charges, which were found from the pent of the accused during his personal search. He has also identified the accused in the court.

##. As observed earlier, Ravjibhai PW-2, who has filed complaint and posed himself as eye witness to the

incident and he identified the rifle from which the accused has fired a gun shot on Dipsinh. He has also identified the accused in the Court and he has also identified the empty used cartridge, which was found in seal packet having signature of 2 panchas and PSI.

##. In cross-examination, the witness has in term admitted while referring the Government Resolution that no constable is required to perform duty beyond 8 hours and the witness has in term admitted that accused was on duty continuously for more than 24 hours. It is important to note that in the cross-examination the witness has in term admitted that he has not seen the actual firing but he came while hearing the shout. The witness has also in term admitted that if the firing is required to be done from the muddamal rifle, then one has to keep the said rifle on the shoulder for adjusting the level and he show Dipsinh, Head Constable, lying. It is further found from the cross-examination that after hearing the shout, he has not gone towards Dipsinh. The witness has also admitted that he was not in the guard room but he was on the lobby at the office of the Mamlatdar alongwith other two constables. He has not given FIR in the police station first. He has further admitted that he has not seen the accused and he has not heard the talk of accused at the police station. He has admitted that out side the office of the Treasury, towards godown, there was a slop. The witness has also admitted that it is true to say that he has not seen the accused doing anything, when he has entered in a guard room. The witness has also denied that as he being an armed constable and deceased, who is unarmed head constable, at the instance of the PSI, he has given complaint against the accused. It is further found from his cross-examination that at the time of giving FIR, PSO Prabhatbhai was present and entire staff of the police station were also gathered. he has admitted that in FIR Ex. 19, no where it was written that a copy of the FIR was received by him. He has admitted that where, he was standing from there, he took only 2 minutes time to reach the police station. It was further found from the cross-examination that incident in question has occurred at 21.15 hours and FIR was given after 1 hour i.e. at 22.15 hours. Ravjibhai PW-2 is the complainant and he has proved the FIR given by him, which at Ex. 19. In the cross-examination, the witness has in term admitted that he has not actually seen the accused firing bullet from his rifle but after hearing the shout, he came. It is further found from his deposition that for firing from the Rifle, one have to keep the rifle on shoulder for level and aiming the person. It is further found that as

per the Government Resolution, the constable has to perform duty only for 8 hours and the accused was on continuous duty for more than 24 hours. From the evidence of Ravjibhai, it also transpires that he has not seen the accused, what he was doing, when he has entered in the guard room. At the same time, as found from the evidence of Ravjibhai that in the guard room, there was one window and as there was no way behind the guard room, it was the duty of the guard to have a round in a guard room, where the weapons were kept. FIR lodged by Ravjibhai about the incident was also after one hour of the incident. Though, the witness has posed himself has an eye witness to the incident, however, as found from the cross-examination, it transpires that the witness has in term stated that he has not seen the actual firing on the deceased but he came to know about the firing after hearing the shout and further that he has seen Dipsinh when he was fallen down and he has not gone towards Dipsinhbhai.

##. FIR was lodged by Ravjibhai at 22.15 hours and according to the complainant, the incident in question has taken place at 21.15 hours. The police station is hardly at a walkable distance of 5 to 6 steps and no information was given to PSO that the accused has fired gun shot from his rifle. On close, scrutiny of the record, it transpires that the report as contemplated under Section 157 of the Criminal Procedure Code, which was to be sent to the Magistrate forthwith, was sent after a lapse of 24 hours. It also transpires from the evidence of complainant Ravjibhai that the accused was performing duty as a Treasury guard and deceased Dipsinh was standing, who fell down at the distance of 293 feet and the distance between the witness, where he was sitting and the accused, where he was performing his duty at a distance of 5 to 6 foot. With this evidence, it is the contention of Mr. Anandjiwala that witness Ravjibhai cannot be considered to be an eye witness and he has not seen the actual firing on the deceased. As found from the evidence of Ravjibhai, he has not heard the talk, which had taken place in the police station between accused and deceased Dipsinh in respect of the grievance of the accused regarding his continuous posting as a guard and inspite of all these facts, in the FIR given by Ravjibhai, this part of the story was highlighted and further, as admitted by witness Ravjibhai that at the time of filing FIR, other police persons were also present and the fact that the FIR was filed after an one hour.

##. PW-3 Ditaji Kanaji has deposed that he was attached

to Meghraj Police Station as Armed Police Constable. Treasury Office and Office of the Mamlatdar was close to each other. The weapons were kept in the guard room, where, one Head constable and one Police Constable were posted and 303 rifles had been provided to head constable while police constable was being provided with 410 rifle. The constable who completed his duty hours, has to hand over his rifle and cartridges and placed in the Treasury guard room and the constable, who has to perform his duty, has take charge of the weapon with cartridges. Similarly the constable, who has performed duty as a guard, he has to take charge of his 303 rifle and cartridges from the guard room. While handing over and taking over charge of weapons, the inter-se signatures were being obtained. On 8.4.1994 Mangabhai was a guard commander. On that day, the witness himself, accused Keshabhai and one Rameshbhai were there as an armed constable. The distribution of guard duty was being done by Head Constable. After completion of duty hours by him on 8.4.1994, Ravjibhai came and Ravjibhai has taken charge of his duty from Mangabhai. On that day, he has performed his duty between 6-00 to 8-00. He has deposed that each guard has to perform duty for two hours. On 9.4.1994, he was on duty in the evening between 6-00 to 8-00 and he has handed over the charge of his duty to the accused. The accused has after taking duty as a guard, went to the police station and he had made grievance that why his duty was not changed and continued him on duty to Head Constable Dipsinh. On considering the grievance of the accused, Dipsinh has told the accused that after the Bandobast duties were over, he will change his duty and accused had accordingly, came back to perform his duty. At that time, Ravjibhai and Rameshbhai were on duty. They were resting at that time. All of sudden there was an explosion and all were awaken and they all set right. The voice of firing was came from the guard room and said firing was done by the accused. The accused has fired the gun shot on Dipsinh and at that time, Dipsinh was standing near bungalow of PSI, near Government godown and Shri Chimanbhai was also standing with him. The bullet fired by accused was hipped through Dipsinh and Dipsinh fell down. At that time, he was standing on the bench situated outside the guard room and said bench was kept adjacent to the wall of Treasury, opposite to that bench the office of the Mamlatdar was situated and nearby, the Treasury office, there was an office of Mamlatdar. He has seen the actual firing and the bullet has hit Dipsinh and Dipsinh died and accused had ran away with his rifle towards guest house. Thereafter, the witness Ravjibhai, Jaydipbhai, Balbhadrasinh and Rameshbhai had caught hold of accused and brought the accused from the guest house

with rifle and accused was handed over to PSO Shri Prabhatbhai. The accused was having rifle No. 303 having butt no. 379. After opening the bolt of the rifle, he has found one empty cartridge box and cartridges found fired. The empty cartridges box was also handed over to PSO Prabhatbhai. From the pent pocket of the accused, two chargers were also found, which were also handed over to PSO Prabhatbhai. Injured Dipsinh was removed to hospital and he has resumed his guard duty. Thereafter, he has received the message that Dipsinh had died due to gun shot, which was fired by accused. This accused has while attributing the motive for firing gun shot, he has indicated that as the duty hours were not changed and the accused was performing duty since last 3 days and deceased Dipsinh was working as head constable in the police station and his duty was to allot duty to police constables and the accused went to the police station and he had talked with writer Dipsinh and made grievance about not changing his duty and accused has thereafter came back to perform his duty and accused had fired bullet from his gun on Dipsinh. The Treasury guard, who were performing duties were provided 410 rifles. On the date of incident, he was on duty between 6-00 to 8-00 p.m. and he has handed over his muskets in favour of accused. The guard has to keep watch on the guard room where rifles were kept. They were sitting there and after taking charge as a guard, accused Keshabhai had gone to guard room and he has placed his musket in the guard room and he had taken the rifle from the guard room, which was of 303 rifle. Such rifle was issued to the accused and accused had came for duty as a guard. He has seen the exact firing done by the accused and the witness has after seeing the firing, had gone to guard room and when he show at that time, 303 rifle issued to accused was not found, where, the 410 musket rifle was found. In the guard room, he has also seen the leather pouch. He has identified the deceased Dipsinh, as there was a light. He has also identified rifle Muddamal article No. 4 as well as other muddamal articles Nos. 5 and 6, which were the same, which were used by accused. He has also identified the accused in the Court.

##. As found from the cross-examination of this witness, he has deposed that he was attached with the police station since last about 17 to 18 years. According to him, Dipsinh was fell down and distance of Police Station was about 25 to 30 feet. However, the witness has also stated that he could not say the exact distance between the police station and the place where deceased Dipsinh was fell down. The witness has stated that approximately

the distance, where the deceased Dipsinh was found lying and the guard room, was about 293 feet. The witness and complainant Ravjibhai were sitting on the same bench. The place where the guard has to perform his duty, was below the osari and bullet, which came out from rifle at the time of firing, was approximately 3 ft. high as well as butt was also at the same distance. He has admitted that, if the bullet was fired from 303 rifle and once it came out from the rifle, it moved round and in process of going ahead, the movement of bullet and it's diameter increased. He has admitted that from the guard room and where Dipsinh has sustained bullet injury, there was a slope and place at which Dipsinh has sustained bullet injury, nearby, there was a godown and on the other side, there were private residential houses. The distance between the guard room and police station was approximately 50 feet and the police station was on the western right from the guard room. The witness has in term admitted that he has not heard what transpired between accused and deceased Dipsinh and he has also seen the same. He has further admitted that he has not seen the accused, has having talk while entering into the police station to any person. Dipsinh and Chimanbhai were talking while standing near the police station at about 15 minutes and thereafter, they went towards Bazar. He has admitted that accused Keshabhai has already taken charge from him at 8-00 p.m.. It is also to be noted that witness has in term admitted in cross examination that he, Rameshbhai and Ravjibhai were talked while sitting in one line and they were concentrating in their talk and has admitted that he has heard the shout of firing and when Chimanbhai has raised cry, at that time, he was concentrating on that side. He had denied the suggestion that he has not seen the actual firing of bullet from Keshbhai's rifle. He has admitted that he has not opened the bolt. He has admitted that he has not found charger in the pent pocket of accused. He has admitted that when they had ran to catch hold of accused, there was no guard at Treasury and Treasury had remained without guard at about half an hour. He has admitted that, there was a instruction that Treasury was not required to be kept without any guard. He has denied the suggestion that accused had ran to find out, who has fired the gun shot on Dipsinh. At the time of handing over the cartridges to PSO, at that time, no persons from the public was present and five cartridges were found from the magjin. So far as sealing on the cartridges were concerned, the witness has admitted that said panchnama was not done in his presence. He has admitted that a person was sitting on a bench from the window of the guard room, what has going on in the guard room,

cannot be seen and the witness has in term admitted that, accused has not seen anything, what the accused had done in the guard room. He has admitted that at the time of firing of 303 rifle, one has to have the support from the back and he has admitted that he has not seen any support, while accused has fired. The witness has in term admitted that he has not seen whether accused was sitting or standing and further admitted that he has not seen actual firing but it was only after hearing the shouts, his attention was drawn towards Chimanbhai.

##. As found from the evidence of PW-3, it is clear that he has not seen firing being fired by the accused and as admitted by him, after he heard shout of firing, his attention was drawn towards Chimanbhai, who raised shouts. It also transpires from the evidence of PW 3 that if one has to fire from 303 rifle, the person must needs support from the back side and the witness has not seen that whose support was taken by accused Keshabhai while firing the shot. This witness has in term not seen the actual firing by accused on Dipsinh.

##. Prosecution has examined Chimanlal Mohanbhai PW-5. As found from his deposition, he was performing duty at Udva Out Police Station as Police Head Constable since about one year prior to the incident. On 8.4.1994, PSI Shri Rathod has to go for training at Hyderabad at 20.50 hrs. and he has taken administrative charge from him and he continued on duty at Meghraj Police Station. On 9.4.1994 as per the order of the Superior Officer to check the vehicle for prohibition drive, on receiving the message, the witness Chimanlal and Head Constable Dipsinh and other police personnels had gone on duty in Government Vehicle. At about 20.15 hrs. the vehicle returned at the police station and necessary entries were made and witness Chimanbhai and Dipsinh were standing near the police station, where there was light and at that time, other police personnels were present at the police station. At about 20.30 hrs. the duty guard of Treasury came murmuring with rifle, where they were standing and the accused told Dipsinh that why his service was not changed and he was continued to perform his duty and he was standing near by them. Head Constable Dipsinh had told him that why he had come there while performing duty at Treasury and his duty hours will be changed next day and at that time, Ravjibhai Head Constable had called back the accused and told the accused that why he has left the guard room. The accused has accordingly, returned back to perform his duty. Thereafter, the witness Chimanbhai and Head Constable Dipsinh were talking while sitting on the bench, near

police station and after sometime at about 21.15 hours, as they wanted to drink water and there was no water in the police station, they both went towards Bazar and they were standing near the godown. In the mean time, one home guard came with mug and glass was brought from Shivabhai Prajapati and nearby one man namely Mahendrabhai came out from his house while cleaning drainage and came towards them, where, they were talking in the meantime, from the Treasury guard, a big explosion sought was heard and Dipsinh was fell down. He had a bleeding on chest. He accordingly asked home guards present, who were standing nearby him as well as Mahendrasinh to keep watch on Dipsinh and to go to police station for bringing jeep for shifting the injured and he ran towards the police station by raising shout that Dipsinh had sustained bullet injury. After he went to the police station, he has called the driver and he alongwith Police Constable Ajusinh, had went towards the place where Dipsinh was found lying and stopped the jeep and after lifting Dipsinh, Dipsinh was removed to hospital, where he was treated by Dr. Sheth and while giving treatment, Dipsinh was declared dead at 21.40 hrs. In the jeep, there was a wireless set and said information was conveyed to police station. After waiting for sometime, they came back to the police station and they came to know from the PSO Prabhatsinh that Keshabhai had fired from the Treasury guard and he ran away and he was apprehended. The witness has further deposed that he has also presumed that when he went to police station to bring jeep at that time, the Treasury guard Keshabhai with his rifle was making some movement and he presumed that Keshabhai might have fired. The witness has further deposed that as Dipsinh was to remove the hospital, he has not ran towards accused. As found from the deposition of the witness, Ravjibhai Head Constable had also asked him that when he was talking with Dipsinh, near godown. He has shown in light that accused taking aim and fired and after firing, he ran away with his rifle towards guest house and Ravjibhai and other police personnels namely Jaydeepsinh had caught hold of accused with rifle. The witness has also deposed about the duties of Dipsinh, who was working as Writer Head Constable at the police station and Dipsinh was performing duty to allot duties to police constables as well as he was also doing accounting work. At the relevant time, as S.S.C. and H.S.C. examinations were in progress and in non-availability of the persons, Keshabhai was given duty of Treasury guard and because of keeping such grudge in mind, he has fired the gun shot on Dipsinh and committed murder. The witness has also identified the accused.

##. As found from the cross-examination, the witness has admitted that at the relevant time, he was in charge of PSI, Administrative at Meghraj Police Station and he could not say that if any serious offence is committed within the jurisdiction of Meghraj Police Station, to whom he has handed over the charge of the investigation and if any serious offence is registered, who ever on duty, that is noted down in the station diary. However, the same is informed through wireless message. He was on duty as PSI for administrative at Meghraj Police Station prior to 24 hours of the incident and during his duty hours, he has not received any wireless message for calling of PSI for investigation in a serious offence. If any message is received, then the same is noted down in the wireless book. As PSI Rathod was to go for training and in a serious offence or investigation of serious offence, for the charge of the said case, the wireless message issued to PSI, then the said message is noted down in the wireless message inward book kept at Meghraj Police Station. However, he could not say that said message is available or not. He was serving in police department since last 28 years. However, he has no knowledge that the wireless message was required to be maintained for how many years. He has admitted that PSI Rathod has not handed over his Government revolver. However, according to him, he might have deposited his rifle. There is no rule that if the person was going for training, the said person has to deposit his weapon. However, there was a rule that if the person is proceeded on leave, then, the weapon which were in his possession, were required to be deposited. He has not noted down the wireless message for which he has given in the message book and he has no knowledge that the said message has been noted down in the police station. He could not remember that he was on C.L. on 8th and 9th April, 1994 and in April, 1994, he was only the head constable at Meghraj Police Station. While referring to the document from the Meghraj Police Station dated 8th and 9th April, 1994, he has admitted that on 8th and 9th April, 1994, he was on leave and this document was exhibited, which was at Ex. 39. It is further found from his cross examination that after Dipsinh had died, he returned from the hospital and came at the police station at 10.00 p.m. and when he returned at the police station, process of recording of complaint was going on. The witness has in term admitted that he has not seen the actual firing by the accused on Dipsinh. He has denied the suggestion that accused has in his presence made grievance about the duty hours before the deceased Dipsinh. In re-examination, the witness has stated while referring

the document at Ex. 39 that on that day, he was shown to be on patrolling duty on highway and accordingly, he was on duty. The witness has further deposed that when they were present at the police station, at that time, they were writing patrol book and they noted down the duties that they have performed. While referring to Ex. 41, where the patrol book is written by him on 8th and 9th April, 1994 as well as from 10th and 12th April, 1994. He was on leave on 12.4.1994. While referring to Ex. 39, his duty was shown on highway patrolling as well as he was shown absent. However, according to the witness, he was on duty and while showing his absent, it was a mistake on the part of PSO. In reply to the question put by the defence that whether this type of mistake was committed by any person, the witness has admitted that such mistake some times committed by mistake / through over sight and such mistake were considered to be of simple nature. In the patrol book, PSI has to put his counter signature to show that he has verified the record and according to the witness, the PSI verified such patrol book at any time. Even some time, after 12 months or even after 5 years and when the witness was asked that whether such verification can be done after 1 year or 5 years, the witness has answered that at any time. He has not noted down in the patrol book that he has seen at the Treasury side and the witness has admitted that in the patrol book, they were required to write in brief and important things and he even considering the length of service, he does not consider important that when he saw on back, he has shown the movement of accused. The witness has admitted that bullet had hit on the chest of the deceased. He has denied the suggestion that bullet has not hit the chest on the deceased as well as on the belly. The witness has in term admitted while referring to the original patrol book that he has not stated that PSI has not verified the said patrol book at any point of time. He had denied the suggestion that he has not seen the accused actually firing and accordingly, he has not written down in the patrol book. He has denied the suggestion that when he returned from the hospital and from talking, he came to know that accused Keshabhai had done firing.

##. From the evidence of this witness No. 5, the witness has in term admitted that he has not seen the actual firing at the instance of the accused on Dipsinh. Though, the witness has in term admitted that he was on leave on 8th and 9th April, 1994. Ex. 39 was the extract of his leave report on 8th and 9th April, 1994. Incident took place on 9th April, 1994. The witness has in term in evidence in chief deposed that he guessed that

accused Keshabhai was holding rifle at Treasury and accused was caught hold of while running away.

##. The prosecution has examined Bhalbhadrasinh Ranjitsinh as PW-7. As found from his deposition that he was present at Meghraj Police Station on 9.4.1994 and at that time, Chimanbhai Head Constable has raised shout that Keshabhai from Treasury had fired and accordingly, witness, Jaydipsinh, Rameshbhai and Ditaji, all the police personnels had ran, who apprehended the accused Keshabhai and accused Keshabhai was caught hold and brought from behind the guest house and produced at the police station. At that time, Keshabhai was having 303 rifle. The rifle was produced before the PSO. No cartridges were found. A fired cartridges was found from Keshabhai. The witness has identified the rifle, which was with the accused on that day and witness has also identified the accused. The motive suggested was that the accused had some altercation with deceased and because of that altercation, the accused has murdered the deceased Dipsinh.

##. In the cross-examination, it is important to note that witness has admitted that he has not stated in his police statement that at that time Chimanbhai Head Constable has raised shout that Keshabhai from Treasury room had fired. He has denied the suggestion that in his police statement, he has not stated that he ran to apprehend the accused. The witness has admitted that it is correct to say that from the rifle, to avoid any other accident, the bolt of the rifle was opened by Guard Commander Ravjibhai. However, the witness has in term admitted that this fact is not stated by him in his police statement.

##. As found from the evidence of PW 7, Bhalbhadrasinh Ranjitsinh, though, in evidence in chief, he has deposed that at that time, Chimanbhai Head Constable raised shout that from the Treasury guard, Keshabhai had fired. However, the same is not stated by him in his police statement. From the evidence of PW-7, he cannot be considered as an witness, who has not seen the incident of firing.

##. PW-8 Rameshbhai Jethabhai was examined at Ex. 48. He has deposed that on the date of incident, he was on duty as Treasury guard. The incident in question has occurred at night on 9.4.1994. Alongwith him as Treasury guard, other guards namely Ditaji - Head Constable, Ravjibhai and accused Keshabhai were present. The accused has taken charge from Ditaji as Treasury guard at

20-00 hrs. Prior to the incident, Keshabhai had visited in the guard room once or twice and then, he was standing near Santari and from there, the accused went toward the police station. The accused had told to deceased Dipsinh that why he still not changed from the duty. Dipsinh had told him that he will see tomorrow and thereafter, the accused had go back to perform his duty as a Treasury guard. The witness has deposed that approximately at about 21.15 hrs. the accused Keshabhai with his rifle had fired on Dipsinh, when Dipsinh was near godown with Shri Chimanlal. At that time, he was sitting on a bench. As the bullet has hit to Dipsinh, Dipsinh fell down and accused Keshabhai with his rifle had ran towards the Government Guest House. Thereafter, the witness, Ditaji, Jaydipsinh and head constable Ravjibhai ran towards Keshabhai and he was apprehended near the guest house and brought at the police station. At that time, the accused was having 303 rifle. The rifle was found loaded. Ravjibhai - Guard Commander had opened the bolt of the rifle, from which, empty box of cartridges was found, which was handed over to PSO. From the pocket of the accused, two chargers of cartridges were found, which was also handed over to Shri Pratapbhai, PSO. Dipsinh was taken to hospital and Dipsinh was declared dead. The examination of the students were going on and all the persons were on duty, and accordingly, from 8.4.1994, they were on duty. He has deposed that allotment of duty was done by writer head constable Shri Dipsinh. As the accused was not relieved from his duty by Dipsinh and therefore, he has some grudge and accused has fired gun shot on Dipsinh. While performing duty as a Treasury guard, the guard has to keep musket rifle 410, which rifle the accused has changed while entering the guard room and accordingly, as the accused has entered into guard room for about 2 to 3 times, he has changed the weapons while entering into the guard room, which kept in the guard room. This witness has also deposed that the Treasury office is adjacent to the Mamlatdar office and opposite thereto, there is town police station and in the compound, there was a tube light and mercury lamp. The witness has identified the rifle, which according to witness was found from the accused. The witness has also identified the cartridges muddamal article No. 5 as well as chargers, muddamal article No. 6, which according to witness, was from the accused Keshabhai. The witness has also identified the accused in the court.

##. As found from the cross-examination that he has taken training of 303 rifle during practise. They were on duty Treasury guard and whenever any needs arise, they were called. After Keshabhai was taken, they remained at

the police station for the entire night. His statement was recorded and he was called for signature on the said statement on the very night. The witness has admitted that he has signed the statement and no document was there, where there was no signature and he has admitted that it is correct to say that if there was no signature on his statement, then the said statement was not of the witness. The witness has also admitted that armed constable at Treasury guard has been provided 303 rifles, while unarmed constables have been provided with 410 musket. The witness has admitted that on that day, in Treasury guard, no unarmed police constable nor any head constable was present. He has admitted that in the guard room, the weapons were kept, where, there was one window and they have to keep watch on guard room and accordingly, they had to enter the guard room. It is further found that the witness has presumed that Keshabhai had gone to guard room two to three times and at that time, he has changed his musket 410. The witness has also admitted that it was correct to say that when Keshabhai has changed his rifle, he has not seen before firing. All the armed constables were talking while sitting on bench, which was kept near the door. The guard has to stand while performing duty as a Treasury guard on the steps. The witness has also admitted that, if firing has taken place from 303 rifle, the bullet moves in the air by taking round. The witness has also admitted that where Chimanbhai was standing, at that place and the person, who was at Treasury, one has to climb the slop. The witness has deposed that according to him, Keshabhai has put his rifle on his shoulder and barrel was found on the lower level, at the height of 3 to 4 feet. He has admitted in his police statement that he has not stated that there was a tube light and mercury light and further that, after talking with all the police staff, it was decided that the question would arise that how they have seen the firing and for that they have concocted the story of having mercury lamp and tube light. He has admitted that level, where they were sitting on bench, was about 5 feet from the land level. According to the witness, they were either one or two persons with Chimanbhai and Dipsinh, were standing. However, he could not say that who were those persons. He could not say that either two persons standing near him had seen the actual firing or not. It is further found from his deposition that from the place, where the firing has taken place, from that place Chimanbhai and deceased Dipsinh were standing, were at a distance of about 300 feet. The witness has also admitted that as accused Keshabhai ran, they have presumed that Keshabhai had fired and after apprehending accused, he was

produced. The witness has denied that some unknown person had fired on Dipsinh and accordingly, accused Keshabhai ran towards that man. He has denied the suggestion that he has not seen the actual firing by accused.

##. From the evidence of PW-8, it is clear that the distance between Treasury and police station was at about 153 feet. According to this witness, his statement was recorded on the same night, wherein, he has put his signature. The witness has also not stated in his statement about the tube light and mercury light at the place. The witness has also in term stated that, if there was no signature in the statement, then it was not his own statement. Admittedly, there was no signature on the statement of witness Rameshbhai. It is further found from the cross-examination that witness has in term had deposed that they assumed that Keshabhai had fired a shot, as Keshabhai had ran from the Treasury guard room and thereby, accused was caught and produced at the police station. The witness has in term admitted that they have not seen any gun shot being fired by the accused. It is further found from the record that one witness was sleeping and he wake up on hearing the shout. Other witness, who came to know from hearing the shout of Chimanbhai and according to PW-8, after he heard the shout and as the accused ran, he presumed that gun shot would have been fired by the accused.

##. Ex. 48 is an inquest panchnama drawn in the presence of the panchas on 9.4.1994 between 23-00 hours to 23.45 hrs. The panchnama was drawn at the hospital, where, the dead body was lying, near door of injection room on the lobby. The dead body was found on stretcher and the description, which was found on the dead body, was noted down. The dead body was identified by unarmed Head Constable Narsinh Samantsinh. It is further found from the said panchnama that the cloths, which were found on the dead body were kept as it is and no articles were seized from the dead body. Ex. 49 was the panchnama recorded in presence of panchas dated 10.4.1994 between 0-00 hrs. to 0-30 hrs. at Meghraj Police Station. The accused was found in his uniform having bakkal No. 1216 with name plate. On personal search of the accused, nothing was found and after providing other pairs of cloths, the pant and shirt were seized and packed in a cloth bag and by putting slip, signed by the panchas and police officer. The said packet was sealed and no injury was found on the accused.

##. PW-9 Din Mahmad Allarakhabbai Makrani has been

examined by the prosecution at Ex. 53 and the said witness has turned hostile to the prosecution and the said witness was examined by the learned Public Prosecutor and accordingly, the witness was posed questions regarding the contents of the panchnama, which according to the witness, he has denied. He has denied the suggestion that he has deposed falsely to save the accused. In cross-examination, from the defence side, it was found that he had a Pan-Bidi Galla near Meghraj Police Station and at the time of panchama, he stayed for about two hours at the Meghraj Police Station and during this period, the preparation of panchnama was going on. He know Prabhatbhai from the beginning and he does not know that from where Prabhatbhai had brought cartridges. It is further found that during the gap of one hour, he had no talked with other panch namely Pravinbhai and at that time, Head Constable Shri Patel was present in the police station. His house was situated at a distance of 300 feet from the police station and he was called upon by the police at his residence and he also acted as a panch in another case, in respect of the another case registered at Meghraj Police Station.

##. PW-10 Virendra Dipsinh Rathod has deposed at Ex. 55. As found from his deposition, his father Dipsinh was working in the police department as Head Constable and at the relevant time, his father was working at Meghraj Police Station. On the day of incident, he was on medical leave and he was present in the quarters. On the day of incident, he came to know about the incident after hearing the shout of gun shot and he had gone to the police station. His father was residing in a quarters situated opposite to the police station and at the time of incident, he alongwith his brother and maternal uncle were sitting on a coat. Keshabhai had fired from his service rifle on his father. Keshabhai was performing his duty as a Treasury guard. The bullet had hit belly of his father and bullet came through his body. His father was working in the police department as Writer Head Constable and his father was keeping account and also distributing the duty hours to the staff. As the SSC examination were in progress, there was no sufficient staff and Keshabhai was kept continue on his duty. According to the witness, the accused has by keeping revenge, as he was continued to perform his duty, the accused had fired on his father. Keshabhai was apprehended and his rifle was seized. He has identified the accused. His father alongwith two to three persons were standing on road, near the police station and at that time, the accused has fired.

##. In the cross-examination, it is found that prior to about half an hour of the incident, he was sitting on a coat, opposite to his house and from that place, he could not see the police station. There was a wall in between the police station and his quarters and this wall was between the Mamlatdar office and Treasury office. His house was situated between police station and Mamlatdar Office and Treasury office. He has admitted that he has not seen conversation, which took place between the accused and his father and he has also admitted that he has also not seen the actual firing by the accused. He has admitted that he was telling the facts that accused has fired the gun shot on his father, was only on hear say. He has not heard any conversation between his father and his accused. The distance between the police station and his quarter was about 30 to 40 feet. The incident of conversation had taken place at about 8-30 p.m. and incident of firing had taken place at about 9-15 p.m. He has not stated in his police statement about the conversation between the accused with his father. It is further found from his deposition that when he has heard some shout between accused and his father, he went to the police station. He has admitted that he has not made any inquiry from his father and after the incident occurred, he had again went to the police station at about 11-30 hrs., he came to know that accused Keshabhai was apprehended and rifle was seized, which he came to know at 2.00 a.m.

##. The other panch-witness Pravinsinh Mangaldas PW-11 has also not supported the prosecution case and has turned hostile.

##. The prosecution has examined Prabhatbhai Valjibhai at PW-13 at Ex. 65. As found from his deposition, he was on duty on 9.4.1994 from 0-30 hrs. He was working as PSO at Meghraj Police Station. Ravjibhai had came for giving complaint about the firing by Keshabhai on Dipsinh. He has registered the offence. He has identified the complaint, which was at Ex. 19. After taking the complaint and after registering the offence, he has seized the rifle from the complainant and from the possession of the accused, used cartridges box and two chargers were recovered. Further investigation of the case was taken over by PSI on the next day. The cartridges and rifle were handed over to PSI. He has also seized the cloths found on the dead body and he has identified the accused in the court.

##. As found from the cross-examination, prior to filing of the complaint, he has no information that who had

fired and who had died. The complainant had came at the police station at 21.45 hours and after registering the offence, he has immediately handed over the complaint for further investigation in favour of the PSI. The investigation, which he has given was not performing his duty at Meghraj Police Station, but the investigation was given to Shri Patel, who was working in LIB Office as PSI. He has telephoned from his police station to PSI to circle inspector, Modasa and informed about the firing prior to arrival of the complainant, who came for giving FIR and he received the telephonic message from the Circle Inspector Modasa that M.M. Patel was given charge of Meghraj Police Station and he was coming with Shri Patel. The witness has denied that Shri Patel and Circle Inspector had already arrived at Meghraj Police Station, when the process of writing FIR was on. He has not investigated the present case and he has not taken any receipt of cartridges, rifle, chargers and empty cartridges box. He has admitted that while taking search of any person, one has to draw panchnama. He has denied the suggestion that he was not carried out the personal search of the accused. He has admitted in his police statement that Dipsinh was not writing cash book. It is further found from his cross-examination that rifle and cartridges, which were seized, were remained unsealed for about 2 hours and no entry was made at Meghraj Police Station about the seizing of rifle and cartridges. It is further found from his evidence that rifle and cartridges, which were seized, were required to be entered in the Arm and Simulations register at the police station. The witness has, however, clarified that only cartridges were required to be noted down in the register. It is further found from his deposition that he has not made any note of timing that at what time, this articles were seized. He has denied the suggestion that complainant has not produced any rifle or cartridges and the same were produced by PSI.

##. The witness Prabhatbhai has stated that he was working as PSO and he was on duty at 0-30 hrs. at Meghraj Police Station and Ravjibhai came for giving FIR. It is also to be noted that he has admitted that rifle and cartridges were remained with him for about 2 hours without seal and further that, this fact is also not noted down in the register, which was maintained in the police station.

##. PW-14 Maheshchandra Mathurbhai Patel, who was the Investigating Officer has deposed at Ex. 66. He has deposed that on 9.4.1994, he was at his residence at Modasa and CPI Modasa, through Police Constable, had

informed him that Keshabhai, Police Constable at Meghraj had by firing, injured Head Constable and he was asked to proceed immediately. Accordingly, he proceeded in a Government vehicle at 21.45 hrs. As per the wireless message from DSP to keep charge of Meghraj Police Station, he has taken over the investigation of case registered at CR. No. 33 of 1994, registered under Section 302 of the I.P.C. from Pratapbhai Valjibhai, PSO. First from the Police Station, he had gone to Primary Health centre at Meghraj and in presence of Panchas, inquest panchnama was drawn. He returned at the police station and in presence of two panchas, cloths of the accused were seized. Thereafter, PSO Prabhatbhai had produced 303 rifle and cartridges, which were seized from the accused. These articles were seized by applying seal of the Meghraj Police Station by obtaining signature of two panchas and the slip were signed by two panchas as well as he himself. He identified the muddamal article No. 4 - Rifle, muddamal article No. 6 - Chargers and muddamal article No. 5 - used cartridges box. He has recorded the statement of witnesses. He has drawn panchnama of the scene of offence, where he has seized sand. He has also made report to the Mamlatdar for preparing map of the scene of offence. He has forwarded the muddamal articles before the FSL. He has sent the muddamal rifle in favour of Ballistics expert and he has also arrested the accused.

##. As found from the cross-examination, according to witness that he was informed about the incident by Circle Inspector on phone and he was put as an incharge of Meghraj Police Station. It is further found that from Himmatnagar Control room, through wireless message, DSP, Sabarkantha, had informed him to take charge at Meghraj Police Station and such information was informed by CPI. He has read this message at Meghraj Police Station. He could not say that after the incident, the DSP Office was informed about the incident and accordingly, such wireless message was sent. In the wireless message, the time about sending the wireless and receiving the wireless message was mentioned. He has denied the suggestion that such wireless message was purposefully not produced before the Court. He could not say in respect of the incident. Head Constable Chimanlal and PSO Prabhatsinh had telephoned him. Before the FIR, PSO had on telephone informed the Superior officer. He could not say that Head Constable Chimanlal prior to the FIR had on wireless message or on telephone informed the superior officer. He has admitted that if, such type of incident has occurred and if the accused was working in the police department and if the person, who has

sustained injury was also working in the police department, then, such thing was to be noted down in the police station and he has admitted that no such nothing was made in the police station and the same was not produced before the Court. However, he has denied the suggestion that said document was not produced as, that will go against the investigation. He has admitted that if any cognizable offence was occurred and such information was received on telephone, such information can be considered as FIR. However, he has denied the suggestion that he has not produced such information, as it goes against the investigation. The witness was also cross-examined at length in respect of allotment of rifle and register maintained in the police station. He has admitted that at the time of incident, his head quarter was at Himmatnagar and he was working with LIB. On 9.4.1994, he had gone to Modasa in respect of LIB work and at that time, when he was at his residence, he came to know about the incident. It is further found from his evidence in cross-examination that he has not informed CPI that he had gone to Modasa for LIB work and he was at his residential house at Modasa. It was further found from the deposition that from Modasa, he had gone to Meghraj with CPI Shri Mistri and the investigation was carried out by him under the supervision of Shri Mistri, CPI, as he was competent person to do all his work, as the offence was visitation. At the relevant time, Shri B.A. Gohil was SDPO. He has denied the suggestion that for investigation, he has taken the advise from CPI Shri Mistri and Shri Gohil, who was Visiting officer. In respect of investigation, CPI Mistri has not done any work. However, he has admitted that supervision of the investigation was with Shri Mistri as well as Shri Gohil and he has not cited Shri Mistri and Gohil as the witness in the chargesheet. On the day of incident, he reached at Meghraj Police Station at 22.30 hrs. and if the person has to go at Meghraj Police Station, then also, one can go from the place of offence and on that day, he had gone to Police Station from the place of incident. In the scene of offence panchnama, there was no reference from the place where Dipsinh fell down and from the place where the Treasury guard performed his duty in between there was a lamp-post. He has further admitted that in the statement of witnesses, they have not mentioned that they have seen the incident from the light of mercury lamp. The witness has also denied the suggestion that it was not correct to say that in the statement given by Rameshbhai Jethabhai, he has not taken his signature. He has denied the suggestion that panchnama was not written as per the say of the panchas and he has also denied that it was not correct to say that during his investigation,

he came to know that the accused, to apprehend some person, has ran towards guest house. He has also denied the suggestion that during his investigation , it was not disclosed that someone has fired gun shot on Dipsinh within the range of 5 mt. He has denied that he has falsely registered the case against the accused and further, that, as the person, who has lost his life, was working in police department and he died and as the offence remained undetected, false case was instituted.

##. In light of the evidence discussed hereinabove, it consist of evidence of eye witnesses and panch witnesses and the evidence of investigating agency, it is equally necessary for us to refer to the evidence of expert examined by the prosecution in respect of the muddamal articles, which were seized by the police and which were sent before the FSL for examination to connect the accused with the crime. The weapon used in the commission of offence namely 303 rifle seized by the police was also sent by the investigating agency alongwith other muddamal article before the FSL. Shri Jayprakash Barot, PW-6, has deposed that he was by qualification, M.Sc. and was working in ballistic department with FSL since last 20 years. He has received 6 parcels, which were sent under CR. No. 33 of 1994 for the offence under Section 302 of the IPC with the note of the PSI Meghraj in sealed cover. Out of these 6 parcels, 3 parcels namely D, E and F were examined by him in his department and remaining 3 parcels namely A, B and C were examined in the FSL in Biology Department. Parcel "D" contains 303 rifle bearing No. D.35250 and in parcel "E", there was empty cartridges of 303 rifle and in parcel No. "F", there were two articles namely F1 and F2. "F1" was half sleeve shirt of brown colour with one name plate showing the name of Chaudhari Keshabhai Maganbhai and "F2" contains one brown pent. All the parcels were having seal. The muddamal rifle, which was received in FSL was tested by Test Firing and before said rifle came to him, it was found that prior that to, it was found that from that rifle firing was done. As found in Ex."E", the empty cartridges of 303 rifles and the firing pin mark on the said cartridges and the mark on ejector were compared and the cartridges found in parcel "D" and by firing from that cartridges and comparing the same, the same was not found exact and accordingly, he was of the opinion that the empty cartridges found in Ex. "E" parcel and rifle, which is received in parcel No. "D", the same is not fired from the rifle Ex. "D". It is further found from his deposition that investigating agency has not sent the used bullet for his examination. While sending the parcel by the investigating agency

alongwith forwarding note from the cloths of the deceased, an opinion was sought about the blood group of the deceased, but they have not called for any opinion of ballistic opinion. The witness has further deposed that if the investigating agency while forwarding the articles, if they would have sent the cloth of the deceased, the used fired bullet from the rifle and PM Note, then, after examining those articles in the report, it contains more information and further, if the Investigating Agency has sent bullet, then, he could have given his opinion. The cloths of the accused namely parcel F1 and F2, which were received in FSL, on that cloths, no marks of residues of fire ammunition can be detected. The analysis report, which he has done, is proved, which is at Ex. 44 and the said report contains his signature. On seeing muddamal articles No.4 rifle, he say that said rifle was examined by him and muddamal article No. 5 - cartridges, was also shown to him and the witness has in term deposed that it is the same cartridges, which he has examined. Similarly, he has also confirmed the article Nos. 7 and 8, which were cloths of the accused, are the same, which were received in FSL and examined in FSL.

##. In the cross-examination, it is found that he could not say anything that in the cloths of the accused namely F1 and F2 - shirt and pent of the accused, there was no mark of any particles of cartridges powder. However, witness has in term, deposed in cross-examination that if this powder could not be found from the cloths, then, it could be said definitely that the person, who has wear the cloths, had done firing. Opinion given by him regarding empty cartridges, is his confirmed opinion. The witness has further deposed that as he has not received the bullet from the cartridges case and therefore, he cannot give any opinion and if the same was received for examination, then the report would be the same, which was the report of empty cartridges. He cannot given opinion about the bullet. Ex. 44, is accordingly, proved by Shri Barot.

##. As found from Ex. 44, the analysis report was forwarded by the Deputy Director of FSL in favour of PSI, Meghraj Police Station under letter dated 13.6.1994 alongwith opinion dated 9.6.1994.

Parcel - D (Ex.D) is one .303" rifle bearing the No. D.35250 with butt number. Parcel - E (Ex.E) is one .303" KF rifle cartridge case having indentation mark on the cap. Parcel - F is contains F1 - one half sleeve khakhi shirt having name plate "Chaudhari Keshabhai

Maganbhai" and F2- one khakhi pants. The result of examination reads as under :-

Exhibit - D " is a .303" rifle in working condition.
Residues of fired ammunition - nitrite and lead could be detected in the barrel washing (washing taken prior to the lab. test firing) of this exhibit, thereby, showing that Ex.D has been used for firing prior to its receipt in the laboratory.

Three KF .303" cartridges (from the lab. stock) were successfully test fired from Ex. D in the laboratory. The effective range of .303" rifle is about one mile.

Exhibit - E is a fired .303" rifle cartridge case.
The characteristic features of the firing pin mark and Ejector mark on Ex.E and that on the test fired cartridge test fired from Ex.D were not found similar. This shows that Ex.E has not been fired from Ex.D.

Exhibit-F1,F2 The two cloths were examined. Residues of fired ammunition could not be detected on these cloths.

The report of Biology division will be sent after the completion of their examination.

Sd/-
(J.J. Barot)"

##. In light of the evidence led by the prosecution and as found from the evidence of Shri Barot, who is an expert, working in ballistic Department with the FSL since last 20 years has on examining the muddamal article Rifle, cartridges and cloths of the accused, as per his opinion and the evidence that the empty cartridges case is not filed from the rifle Ex. D and on articles F1 and F2, residues of fired ammunition could not be detected.

##. Mr. Anandjiwala, learned advocate for the appellant accused has vehemently urged that in light of the evidence laid by the prosecution, the learned trial Judge was not right in accepting the prosecution case that the accused had committed offence of murder of deceased Dipsinh and thereby committed an offence under Section 302 of the IPC. It is his submission that as found from

the evidence and map on record at Ex.51, office of the Mamlatdar, strong room, guard room, Treasury and City Survey Office is situated in one direction. The lobby is common, which cover the office of the Mamlatdar, strong room, guard room and Treasury. The Santari position is on the lower side below the lobby and it is the prosecution case that the accused was performing duty at that place, opposite to this office on the southern side, there is a police station at a distance of 150 ft. and close by that, there is a PSI quarters. There is a road goes towards the Bazar. The lamp pose, which is shown in the map is at a distance of 69 feet, where, Dipsinh was fell down and the distance where the accused was performing his duty, as a Treasury guard and the place where Dipsinh was standing with other prosecution witnesses, is at a distance of 293 feet. There is also a compound wall of Government godown. The guest house is found on the north western side, where, according to the prosecution, the accused was brought by the police person with rifle. In between, there is no light and the lamp post, which is found, is at the distance of 69 feet away, where Dipsinh was standing and taking with prosecution witness Chimanlal - PW5. In light of the above, it is the submission of Mr. Anandjiwala that it is not possible for any of the witnesses to see the incident of actual firing by accused on Dipsinh and the prosecution witnesses, who deposed before the court posing themselves as eye witnesses to the incident, are not probable and in view of the clear admission by those witnesses in cross-examination that they have not seen the actual shot being fired by the accused. While discussing the evidence of the witnesses in detail, it transpire that one witness was sleeping and he wake up on hearing the shout. The another witness has deposed that he was at the police station and on hearing shout of Chimanbhai, his attention was drawn there, while the third witness has, as per his evidence stated that, he was sitting on a bench and he heard the shout and on seeing the accused running with rifle, he thought that the gun shot would have been fired by the accused.

##. Mr. Anandjiwala has also while taking us through the observations made by the learned Trial Judge, has highlighted that in para 39, the learned Trial Judge has observed that there is very short time between the shot being fired and the attention being drawn by the witnesses. "There is very thin line of demarcation" and therefore, though, the witnesses have not seen the actual firing, it cannot be said that they are not called to be an eye witnesses to the incident.

##. As per the observation made by learned Trial Judge, while appreciating the evidence of eye witnesses, the learned Trial Judge has considered some of the circumstances to connect the accused for commission of offence, which are as under :-

(i) The accused was posted as Treasury Guard since 8.4.1994 and on 9.4.1994, he was continued on the same posting.

(ii) The accused has made grievances in loud tone before the Head Constable Dipsinh as to why he was continued on the same posting since long, which suggests the motive for the crime.

(iii) The accused was on duty as Treasury Guard duly armed with the gun.

(iv) The conduct of the accused after firing that he run away from the place and he was concealing himself behind the Government Guest House and he was caught by the witnesses behind the godown duly possessed with 303 rifle.

(v) During search, on opening the bolt, empty cartridge was recovered and two cartridges were recovered from his pocket.

##. Mr. Anandjiwala has vehemently urged that as established from the evidence that even as per the Government Resolution that no person can be continued on the same post for more than 8 hours and admittedly, even as per the prosecution case, the appellant accused was on continuous duty as a Treasury guard from 8.4.1994 to 9.4.1994 and the motive suggested for committing such serious offence is not at all considered to be a motive for committing such offence, as even according to the prosecution, when the appellant accused had ventilated his grievance before Dipsinh and on getting satisfactory reply from deceased Dipsinh, the accused had immediately went back and took his position as a Treasury guard. Ballistic Expert, on examining the rifle, has in term opined that the cartridge was not fired from the muddamal 303 rifle. In view of the evidence of ballistic expert and as per his opinion, it is contended that the learned Trial Judge was not right by reaching conclusion that shot was being fired from 303 rifle, which was seized from accused. The circumstances, which the learned Trial Judge has placed reliance to connect the accused that the accused has after firing, ran away, while he was in duty as Santari (guard) with rifle from his duty place,

towards the Government guest house and that circumstances was put to the accused and accused has in his reply, by explaining that circumstances in his statement under Section 313 of the Criminal Procedure Code, has in term stated, which reads as under :-

"It is false. I had run behind the guest house for the reason that on hearing the shot being fired, I had seen one person running from Bazar towards the Rest house and with a view to catching that person, I had run after him."

##. As found from the evidence and as discussed above, even as per the prosecution case that the place at which, the accused was on duty and the place, where the deceased fell down due to bullet shot is more than 263 feet. The medical evidence led by the prosecution and as found from the evidence of Dr. Sheth, who in term admitted in cross-examination that looking to the injury found on the deceased, the firing which has taken place, has not been fired at the distance of more than 5 meters. While performing PM of the dead body of the deceased Dipsinh, the medical officer has found blackening powder marks around the entry wound and because of this reason, the doctor has opined that the shot must have been fired from a short distance.

##. In view of the medical evidence led by the prosecution on the dead body, it is found blackening powder marks around the entry wound and as per the opinion of the Doctor, the shot must have been fired from a short distance and it is the prosecution case that accused fired on Dipsinh , who was at the place where he was performing duty as a guard Treasury, which is at a distance of about more than 263 feet. The weapon, which has been recovered and sent for examination of the ballistic expert, it shows that firing has not taken place from the weapon, which was sent for examination and the same was tested in the ballistic department. Furthermore, the topography of the place of incident, as suggested by the prosecution witnesses, that the deceased was standing near godown, was talking with Chimanbhai, one of the prosecution witness on the ground and the accused was discharging his duty near Treasury Office, was at a ground level. As found from the evidence, which we have discussed earlier, it is their case that for using rifle and firing a shot, shoulder is to be used for resting the rifle and if the rifle is aimed at lower level, the shot would not have reached to the deceased. The PM report, where the injuries are mentioned and as deposed by doctor, the injury which is in the form of

entry wound and exit wound, it is going downward. It is, therefore, clear that the level of firing is on a higher plea than the deceased was standing on the ground and therefore, the story suggested by the prosecution is not probable and the explanation rendered by the accused that he had seen a person running away from Bazar side towards the guest house, he ran after that man to catch him is absolutely a probable story and in light of the opinion of the ballistic expert, the firing has not taken place from the rifle, which was sent for examination. In our view, the circumstances, which the learned Trial Judge has considered for connecting the accused for the offence is against the opinion of ballistic expert as well as the medical evidence. In our view, the prosecution has not completed the chain from the evidence, while connecting the accused for the offence. The learned Trial Judge has in our view mainly relied upon the fact that the accused was holding the rifle, while he was performing duty as Treasury Guard at Treasury Office. Even considering the evidence led by the prosecution that other police persons had chased the accused, when they found accused running with rifle and they have apprehended the accused with the weapon, which was seized from him and the same was handed over to PSO Shri Prabhatsinh without making any panchnama, in our view, the prosecution has not established the case beyond reasonable doubt that he is the accused, who had fired from his rifle and the bullet from his rifle has hit deceased Dipsinh. The learned Trial Judge has also while appreciating the evidence has made observation regarding investigation of the case and as observed that bullet was not recovered and the investigating agency has not made any attempt to find out the said bullet. However, according to the learned Judge, such act on the part of Investigating Officer can be considered negligence on their part and the learned Trial Judge was of the view that it would not effect the prosecution case to discard the evidence led by the prosecution. In our view the finding of bullet is very much important to establish that whether that bullet is used while firing from a particular rifle. Thereafter, as per the opinion of the ballistic expert, he has in term suggested that weapon which was seized, from which the firing has not taken place and further, it is found from the evidence of Investigating Officer that bullet is not recovered.

##. In light of all these evidence, the Court has to consider that whether the learned Trial Judge was right in accepting the prosecution case by convicting the accused. The witnesses, who have been examined and posed to be the eye witnesses to the incident, as discussed

earlier, all the witnesses have in term admitted that it is only after hearing the shouts, their attention were drawn and it is their case that they show the accused with weapon and the person, who was on duty near Treasury guard had run after the accused. In our view, even the circumstances, which were relied by the learned Trial Judge will not show that the prosecution has established beyond reasonable doubt that it is the accused, who had aimed towards deceased Dipsinh and he fired the shot, which has hit deceased Dipsinh. In our view, it is the case, where the accused deserves benefit of doubt, as the prosecution has not completed the entire chain to connect the accused with the offence. In our view, on reappreciating the evidence of the prosecution witnesses with the documentary evidence namely opinion of the expert namely Medical Officer, who has performed the PM on the dead body of the deceased and injury noted down in the PM note and opinion of the ballistic expert, it does not connect the accused with the offence and in our view, accused deserves to be given benefit of doubt.

##. Accordingly, appeal is allowed. The judgement and order of conviction and sentence dated 20.7.1998 recorded by the learned Additional Session Judge, Sabarkantha, Camp at Modasa in Sessions Case No. 59 of 1994 convicting the accused for the offence under Section 302 of the I.P.C. is hereby quashed and set aside. The order of sentence imposing RI for life and fine of Rs.1000=00 (Rs. One Thousand Only) and in default RI for six months is accordingly set aside. The accused is ordered to be set at liberty forthwith, if he is not required in any other case. The fine, if paid, is ordered to be refunded to the appellant accused.

The order passed by the learned Trial Judge regarding disposal of muddamal is confirmed.

As the muddamal in question is received from the trial Court, the Registry is directed to send back the said muddamal articles Nos. 1 to 9 (including rifle) to the trial Court forthwith by special messenger with proper care, as one of the muddamal articles is rifle.

(D.K. Trivedi, J.)

(J.R. Vora, J.)
pallav